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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/784,855	02/23/2004	James H. Keithly	006943.00608	9428

66811 7590 07/10/2007

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EXAMINER	
NGUYEN, TRINH T	
ART UNIT	**PAPER NUMBER**
3644	

MAIL DATE	DELIVERY MODE
07/10/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No.	Applicant(s)	
	10/784,855	KEITHLY ET AL.	
	Examiner	Art Unit	
	Trinh T. Nguyen	3644	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *Amendment dated on 4/17/07*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) 1-34 is/are pending in the application.

4a) Of the above claim(s) 1-19 is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) 20-34 is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☐ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____.
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

Double Patenting

1. The nonstatutory double patenting rejection is based on a judicially created doctrine grounded in public policy (a policy reflected in the statute) so as to prevent the unjustified or improper timewise extension of the "right to exclude" granted by a patent and to prevent possible harassment by multiple assignees. See *In re Goodman*, 11 F.3d 1046, 29 USPQ2d 2010 (Fed. Cir. 1993); *In re Longi*, 759 F.2d 887, 225 USPQ 645 (Fed. Cir. 1985); *In re Van Ornum*, 686 F.2d 937, 214 USPQ 761 (CCPA 1982); *In re Vogel*, 422 F.2d 438, 164 USPQ 619 (CCPA 1970);and, *In re Thorington,* 418 F.2d 528, 163 USPQ 644 (CCPA 1969).

A timely filed terminal disclaimer in compliance with 37 CFR 1.321(c) may be used to overcome an actual or provisional rejection based on a nonstatutory double patenting ground provided the conflicting application or patent is shown to be commonly owned with this application. See 37 CFR 1.130(b).

Effective January 1, 1994, a registered attorney or agent of record may sign a terminal disclaimer. A terminal disclaimer signed by the assignee must fully comply with 37 CFR 3.73(b).

2. Claims 20-33 provisionally rejected under the judicially created doctrine of obviousness-type double patenting as being unpatentable over claims 20,22-26,28,29, and 31-39 of copending Application No. 10/017,126. Although the conflicting claims are not identical, they are not patentably distinct from each other because claim 20 (narrower) of the copending Application No. 10/017,126 "anticipates" claim 20 (broader) of the instant application. Accordingly, the copending Application No. 10/017,126 claim 20 is not patentably distinct from the instant application claim 20, since the copending Application No. 10/017,126 claim 20 requires element (i.e., a concentration of not more than 1.5 weight percent) while the instant application claim 20 only require element (i.e., a concentration of not more than about 2 weight percent). Thus it is apparent that the more specific copending Application No. 10/017,126 claim 20 encompasses the instant application claim 20. Following the rationale in In re Goodman cited in the preceding

paragraph, where applicant has once been filed an application or granted a patent containing a claim for the specific or narrower invention, applicant may not then obtain a second application or patent with a claim for the generic or broader invention without first submitting an appropriate terminal disclaimer.

This is a provisional obviousness-type double patenting rejection because the conflicting claims have not in fact been patented.

Claim Rejections - 35 USC § 103

3. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

4. Claims 20-33 are rejected under 35 U.S.C. 103(a) as being unpatentable over Keithly et al. (US 6523496).

Keithly et al. disclose that it is old and well known to provide a process for enhancing commercial poultry breeder operations comprising: supplying a space having an area at which poultry breeders are fed; providing a breeder poultry feed diet composition comprises a nutritive balanced feed composition and a citrus feed supplement (note that Keithly et al.'s citrus byproduct bedding litter can be considered as a breeder poultry feed diet composition wherein the citrus byproduct bedding litter can be eaten by the poultry chicks; further note that the citrus byproduct bedding litter is comprised of vegetation sources (such as rice hulls, peanut hulls, crushed corn cobs, chopped straw, hay or corn stover) which can be used in animal feed and therefore can

be provided some nutritious value to the poultry chicks); and placing the breeder poultry feed diet composition within the area at which poultry breeders are fed.

Keithly et al. do not teach that the citrus feed supplement being at a concentration of not more than about 2 weight percent based on the total weight of the poultry feed diet composition. However, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Keithly et al.'s process so as to include a citrus feed supplement being at a concentration of not more than about 2 weight percent, since it has been held that where routine testing and general experimental conditions are present, discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980). Also, since applicant did not provide a reason and/or showing any criticality as to why the citrus feed supplement has to be at a concentration of not more than about 2 weight percent (see page 14 of the instant specification, Applicant only stated that "Typically, the citrus feed supplement is at a level of not greater than about 2 weight percent. Preferably, the feed supplement according to the invention is at a level of not greater than about 1.5 weight percent. An especially preferred range is between about 0.2 weight percent and about 1 weight percent"), it is believed that through trial and error during the testing procedure that one of ordinary skill in the art comes up with a desirable citrus feed supplement weight percentage to meet the design criteria for forming a breeder poultry feed diet composition having a balanced feed composition and a citrus feed supplement. Furthermore, it would appear

that the concentration of the citrus feed supplement in Keithly et al. would provide an equally balanced feed composition and/or supplement as well.

Regarding claims 21-23 and 34, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Keithly et al.'s process so as to include a citrus feed supplement being at a specific concentration (i.e., a concentration of not greater than about 1.5 weight percent, a concentration of at least about 0.2 weight percent and up to about 1 weight percent, a concentration of at least about 4 pounds and up to about 16 pounds per ton, a concentration of not greater than about 1.6 weight percent) as claimed, since it has been held that where routine testing and general experimental conditions are present, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233. Also, since applicant did not provide a reason and/or showing any criticality as to why the citrus feed supplement has to be at a specific concentration as claimed in claims 21-23 (see page 14 of the instant specification, Applicant only stated that "Typically, the citrus feed supplement is at a level of not greater than about 2 weight percent. Preferably, the feed supplement according to the invention is at a level of not greater than about 1.5 weight percent. An especially preferred range is between about 0.2 weight percent and about 1 weight percent...especially preferred range is between about 4 and about 16 pounds per ton"), it is believed that through trial and error during the testing procedure that one of ordinary skill in the art comes up with a desirable citrus feed supplement concentration to meet the design criteria for forming a breeder poultry feed diet composition having a balanced feed composition and a citrus feed supplement.

Furthermore, it would appear that the concentration of the citrus feed supplement in Keithly et al. would provide an equally balanced feed composition and/or supplement as well.

Regarding claim 24, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Keithly et al.'s process so as to include a moisture content being at a specific content (i.e., of between about 5 and about 12 percent by weight) as claimed, since it has been held that where routine testing and general experimental conditions are present, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233. Furthermore, it would appear that the moisture content in Keithly et al. would provide an equally citrus byproduct as well.

Regarding claim 28, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Keithly et al.'s process so as to include a particle size of about 2 mm or less, since it has been held that where routine testing and general experimental conditions are present, discovering the optimum or workable ranges involves only routine skill in the art. In re Aller, 105 USPQ 233. Furthermore, it would appear that the particle size in Keithly et al. would provide an equally citrus byproduct as well.

For claims 31-33, note that the method steps as claimed are inherently performed within Keithly et al.'s process wherein Keithly et al.'s process disclose a process of enhancing commercial poultry breeder feed diet composition as similar to those claimed by the applicant.

For claim 34, it would have been obvious to one having ordinary skill in the art at the time the invention was made to have modified Keithly et al.'s process so as to include a citrus feed supplement being at a concentration of not greater than about 1.6 weight percent, since it has been held that where routine testing and general experimental conditions are present, discovering an optimum value of a result effective variable involves only routine skill in the art. In re Boesch, 617 F.2d 272, 205 USPQ 215 (CCPA 1980).

Response to Arguments

5. Applicant's arguments filed 4/17/07 have been fully considered but they are not persuasive.

6. In response to applicant's arguments regarding to Keithly does not disclose using a composition that includes both a nutritive feed composition and a citrus feed supplement, it is note that Keithly et al.'s citrus byproduct bedding litter can be considered as a breeder poultry feed diet composition wherein the citrus byproduct bedding litter can be eaten by the poultry chicks. Further note that the citrus byproduct bedding litter is comprised of vegetation sources (such as rice hulls, peanut hulls, crushed corn cobs, chopped straw, hay or corn stover) which can be used in animal feed and therefore can be provided some nutritious value to the poultry chicks).

7. In response to applicant's arguments regarding to the showing of criticality of the recited citrus supplement concentration, it is noted that there is only showing of criticality of the recited citrus supplement concentration of 1.6 wt. % but there is no showing of criticality of the recited citrus supplement concentration of 1.1 and/or 1.2

and/or 1.3 and/or 1.4 and/or 1.5 and/or 1.7 and/or 1.8 and/or 1.9 wt. % (note that these concentrations are the concentrations of not more than about 2 weight percent).

Conclusion

8. **THIS ACTION IS MADE FINAL.** Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

9. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Trinh T. Nguyen whose telephone number is (571) 272-6906. The examiner can normally be reached on M-F (9:30 A.M to 6:00 P.M). The examiner's supervisor, Teri Luu can be reached on (571) 272-7045 for the purpose of status inquiry only. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

Trinh T Nguyen
Primary Examiner
Art Unit 3644

6/24/07